Supreme Court, U.S.
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No. 93-1766

In The

Supreme Court of the United States

October Term, 1993

U.S. ANCHOR MFG., INC.,

Petitioner,

v.

RULE INDUSTRIES, INC. and TIE DOWN, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF TIE DOWN INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 27, 1994

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QUESTIONS PRESENTED

Respondent Tie Down, Inc. (hereinafter "Tie Down")* respectfully submits that the questions presented should be restated as follows:

1. Did the Eleventh Circuit err in finding that there was insufficient evidence to support an attempt to monopolize claim for alleged predatory pricing in this case?

2. Did the Eleventh Circuit err in finding that there was insufficient evidence to support an antitrust conspiracy claim in this case?

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* Respondent Tie Down Inc., a/k/a Tie Down Engineering Inc., has no parent companies or subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

REASONS FOR DENYING THE PETITION 1

I. PETITIONER'S DESCRIPTION OF THE QUESTIONS PRESENTED AND STATEMENT OF THE CASE MISCHARACTERIZE THE RECORD AND THE HOLDING BELOW 1

II. PETITIONER GIVES THE COURT NO REASON TO CONSIDER THE ATTEMPT TO MONOPOLIZE CLAIM 2

A. Petitioner Mischaracterizes The Eleventh Circuit's Holding On The Attempt To Monopolize Claim 2

B. Even If The Eleventh Circuit's Opinion Could Be Read As Being Inconsistent With Its Prior Decisions Rejecting A Bright-Line Market Percentage Test, Under *Wisniewski v. United States* The Circuit Court Should Be Given The Opportunity To Resolve This Supposed Internal Conflict 4

C. The Eleventh Circuit's Decision On The Attempt To Monopolize Claim Is Consistent With Governing Authority 5

D. The Eleventh Circuit Correctly Held That The Particular Evidence In This Case Is Insufficient To Support The Attempt To Monopolize Claim 7

III. PETITIONER GIVES THE COURT NO REASON TO CONSIDER THE CONSPIRACY CLAIM ... 9

TABLE OF CONTENTS – Continued

Page

A. Petitioner Failed To Argue At Trial Or In Its Appellate Brief That This Is A Price-Fixing Case Involving Per Se Rules Of Antitrust Law 9

B. The Eleventh Circuit's Decision On The Conspiracy Claim Is Consistent With Governing Authority 12

C. The Eleventh Circuit Correctly Held That The Particular Evidence In This Case Is Insufficient To Support The Conspiracy Claim 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 15

Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) 5

Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. ___, 113 S. Ct. 2578 (1993) 6

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 7

Carlson Mach. Tools, Inc. v. American Tool Inc., 678 F.2d 1253 (5th Cir. 1982) 14, 15

Chisholm Bros. Farm Equip. Co. v. International Harv. Co., 498 F.2d 1137 (9th Cir. 1974) 14

Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969) 4, 5

The Jeanery Inc. v. James Jeans Inc., 849 F.2d 1148 (9th Cir. 1988) 15

Lewis Service Center Inc. v. Mack Trucks Inc., 714 F.2d 842 (8th Cir. 1983) 14

Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574 (1986) 6, 7, 13

McGahee v. Northern Propane Gas Co., 858 F.2d 1487 (11th Cir. 1988) 4, 5

TABLE OF AUTHORITIES – Continued

Page

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 13, 14, 15

Posters 'n' Things, Ltd. v. United States, No. 92-903 (U.S. May 23, 1994) 12

Singleton v. Wulff, 428 U.S. 106 (1976) 12

Sulmeyer v. Coca-Cola Co., 515 F.2d 835 (5th Cir. 1975) 4

United States v. Colgate & Co., 250 U.S. 300 (1919) 14

United States v. Columbia Steel Co., 334 U.S. 495 (1948) 1, 4

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 14

Wisniewski v. United States, 353 U.S. 901 (1957) 4, 5

REASONS FOR DENYING THE PETITION

The Eleventh Circuit's opinion below is correct and does not conflict with any opinion from this Court or from any court of appeals. This case involves nothing more than the fact-bound application of settled law to the particular facts of this case. Accordingly, review of this case is not warranted.

I. PETITIONER'S DESCRIPTION OF THE QUESTIONS PRESENTED AND THE STATEMENT OF THE CASE MISCHARACTERIZE THE RECORD AND THE HOLDING BELOW.

The petition in this case contains several misstatements of fact and law, including a distortion of the holding of the court below. Petitioner states that the Eleventh Circuit imposed on all attempted monopolization claims "a bright-line requirement that the defendant possess at least 50% of the relevant market at the beginning of its predatory conduct." (Pet. 11). In reality, however, the court of appeals rejected a bright-line approach and, citing *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), cautioned that "the relative effect of percentage command of the market varies with the setting in which that factor is placed." (Pet. App. 31a). The court of appeals also specifically noted that the relevant time for measuring market share was not just at the beginning of the alleged predatory conduct but "throughout the time when it was alleged to have continued." (Pet. App. 34a).

Petitioner asserts that the decision of the court of appeals represents a substantial departure from existing

law on "the *per se* illegality of vertical price fixing agreements." (Pet. 10). Petitioner failed to argue in its appellate brief that this is a price-fixing case or that *per se* rules of antitrust law should apply. Accordingly, the decision of the court of appeals did not even address the requisites for establishing liability for a "price-fixing agreement." (Pet. App. 35a-38a).

Petitioner contends that the underlying evidence supports the jury verdict. The Eleventh Circuit, after a vigorous and detailed review of the entire record, found otherwise. The actual record reveals that there was no dangerous probability that the alleged predatory pricing scheme could succeed and that Tie Down did not knowingly participate in a below-cost pricing scheme. As recognized by the court of appeals, Petitioner's admissions at trial establish that Rule could never maintain a monopoly or supra-competitive prices even if U.S. Anchor went out of business. (U.S.T.X. 12; R32-76; R36-186, 187). Furthermore, undisputed evidence established that Tie Down never "agreed" with Rule on any price level (R34-24; R40-141; R41-53), that Tie Down had no control whatsoever over Rule's prices (Pet. App. 13a; R33-187; R34-100; R46-33; R34-35), and that Tie Down had no knowledge that Rule ever engaged in below-cost pricing. (Pet. App. 37a; U.S.T.X. 517; U.S.T.X. 405; U.S.T.X. 395).

II. PETITIONER GIVES THE COURT NO REASON TO CONSIDER THE ATTEMPT TO MONOPOLIZE CLAIM.

A. Petitioner Mischaracterizes The Eleventh Circuit's Holding On The Attempt To Monopolize Claim.

The Eleventh Circuit did *not* hold that, as a matter of law, a defendant can never be liable for attempted

monopolization unless it has at least 50% of the relevant market at the inception of the alleged misconduct. Instead, the court ruled on the specific facts of this case that (1) U.S. Anchor had failed to present evidence of Rule's market share at the time the alleged attempt began (October 1985), and (2) the best evidence available indicated that U.S. Anchor had a greater and ever increasing share of the market throughout the entire relevant time period, while Rule's steadily declined. (Pet. App. 10a).

The only evidence in the record regarding market share when the alleged predation began was Rule's month-by-month comparison of Rule's and U.S. Anchor's sales. That evidence showed that in October 1985, and throughout the remainder of the 1985-86 anchor season, U.S. Anchor sold more anchors than Rule did and that for the entire 1985-86 season, Rule's market share was 30.1%. (Pet. App. 9a). The undisputed evidence also showed that Rule's market share steadily declined each season thereafter, reaching its low in the 1989-90 season at 24.3%. *See* Rule's Eleventh Circuit Brief at 9. Considering this evidence, the court ruled that U.S. Anchor had failed to show that Rule had a dangerous probability of monopolizing the generic fluke-style anchor market. (Pet. App. 33a-34a).

Although the court started with the undisputed premise that "something more than 50% market share would be required to show *actual* monopoly. . . . " (Pet. App. 32a, emphasis in original), it did not purport to establish a "bright line" 50% market share test for all attempted monopolization claims. The court specifically noted that " 'one must be particularly wary of the numbers game of market percentage when considering an

"attempt to monopolize" suit' under the dangerous probability standard." (Pet. App. 31a, *quoting Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969)). The Eleventh Circuit then employed the same case-by-case analysis as found in previous binding Eleventh and Fifth Circuit authority. *See, e.g., McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988); *Sulmeyer v. Coca-Cola Co.*, 515 F.2d 835, 849-51 (5th Cir. 1975); *Cliff Food*, 417 F.2d at 207 n.2. Indeed, the court of appeals cited *United States v. Columbia Steel*, 334 U.S. 495 (1948), for the proposition that "the relative effect of percentage command of the market varies with the setting in which that factor is placed." (Pet. App. 31a). The court's comment that Rule's market share remained below 50% simply pointed out that Rule was never able to achieve a dominant market position even after years of challenged conduct. Petitioner's entire argument is based on a misreading of the opinion below. Once the one sentence Petitioner contests is put in context, it is apparent that the Eleventh Circuit's opinion is correctly based on its analysis of the facts of this case.

B. Even If The Eleventh Circuit's Opinion Could Be Read As Being Inconsistent With Its Prior Decisions Rejecting A Bright-Line Market Percentage Test, Under *Wisniewski v. United States*, The Circuit Court Should Be Given The Opportunity To Resolve This Supposed Internal Conflict.

As discussed above, binding Eleventh Circuit precedent squarely rejects a bright-line market percentage test for evaluating dangerous probability of success. *See*

McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1505-06 (11th Cir. 1988) (the market share necessary for a showing of dangerous probability of success depends on a number of factors); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969) ("one must be particularly wary of the numbers game of market percentage when considering an 'attempt to monopolize' suit").[1] The existence of this clear precedent which, as mentioned above, was specifically discussed and applied by the Eleventh Circuit in its opinion below, strongly suggests that the bright-line reading urged by petitioners was not intended. Surely the court of appeals would not have so cavalierly overruled these prior cases without even mentioning that it was doing so.

Even if the Eleventh Circuit's opinion could be read as urged by petitioner, thereby creating a conflict with other binding precedent within the Circuit, prior decisions of this Court dictate that the court of appeals be given an opportunity in later cases to make its meaning clear and resolve any possible internal inconsistencies. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Accordingly, this Court should deny the petition for this independent reason.

C. The Eleventh Circuit's Decision On The Attempt To Monopolize Claim Is Consistent With Governing Authority.

Petitioner's suggestion that the Eleventh Circuit's decision "represents a substantial departure from existing

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[1] Decisions of the old Fifth Circuit prior to the creation of the Eleventh Circuit in 1981 are binding on the Eleventh Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981).

law" on the dangerous probability element of a Section 2 Sherman Act claim ignores the context of this case. This is a predatory pricing case which is governed by *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. ___, 113 S. Ct. 2578 (1993) and *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574 (1986).

Brooke Group explained the dangerous probability element in a predatory pricing case:

> The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.

113 S. Ct. at 2588. Citing *Matsushita*, the Court observed in *Brooke Group* that "in order to recoup their losses, predators must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices." *Id.* at 2589. Significantly, both *Brooke Group* and *Matsushita* held that summary disposition is appropriate where subsequent market data indicate that the defendant would not be able to recoup its lost profits. Indeed, both cases found that the failure of the alleged scheme after years of challenged pricing is evidence that successful recoupment could not occur. *Brooke Group*, 113 S.Ct. at 2593-2595; *Matsushita*, 475 U.S. at 591-593.

The decision of the Eleventh Circuit in this case, therefore, is completely consistent with governing Supreme Court authority. The Eleventh Circuit held that there was no dangerous probability of success because

Rule possessed less than 50% market share "at the time the alleged predation began *and throughout the time when it was alleged to have continued.*" (Pet. App. 34a, emphasis added). The Eleventh Circuit's conclusion that the dangerous probability element was negated by the evidence of Rule's failure to achieve a dominant market position after years of alleged below-cost pricing really just mirrors this Court's conclusion in *Matsushita*:

> Two decades after their conspiracy is alleged to have commenced, petitioners appear to be far from achieving this goal. . . . Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. [cit.]. Neither the District Court nor the Court of Appeals found, however, that petitioner's share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing – that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.

Matsushita, 475 U.S. at 591 (emphasis original). *See also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n. 15 (1986) (citing authorities for proposition that 60% market share is necessary for a successful predatory pricing campaign).

D. The Eleventh Circuit Correctly Held That The Particular Evidence in This Case Is Insufficient To Support The Attempt To Monopolize Claim.

Petitioner initially complains that the Eleventh Circuit erred with respect to the dangerous probability

element by redefining the relevant market to exclude the premium brand Danforth anchors. The market definition used by the Eleventh Circuit, however, was based on an extensive review of the facts and application of settled precedent. In fact, as argued by Tie Down in its appellate brief, Petitioner's admissions *in judicio* required the market definition used by the Eleventh Circuit. Petitioner's response to Rule's interrogatories limited the relevant product market to generic anchors. Petitioner's president, Mr. Chapman, admitted at trial that the anchors made by Petitioner were not involved in "price competition" with the Danforth anchors. Mr. Chapman also unequivocally identified the generic anchors as the competing products in correspondence. (*See* Brief of Appellant Tie Down Engineering, Inc., 7).

Regardless of the market definition used, however, additional admissions of Petitioner and other unrefuted evidence mandate the conclusion that there was never a dangerous probability that Rule could ever maintain a monopoly position in the market or the supracompetitive profits which are essential to the recoupment aspect of the alleged scheme even if Petitioner went out of business. For example, in Petitioner's business plan, Mr. Chapman wrote that the market was "wide open" and that "no supplier of a commodity product will maintain 80% market share for the customer not only desires a choice with whom to do business; many customers insist on handling this commodity from a different vendor." (U.S.T.X. 12). Mr. Chapman also admitted at trial in testimony and in documents that it simply would not be feasible to raise prices to supracompetitive levels even

with a majority share of the market. (R32-76). Other witnesses called by both sides confirmed the implausibility of maintaining high prices even with a majority market share because of the continued threat of competition from Korea and China. (*E.g.* R36-186, 187; R37-20; R44-176, 177; R38-9; R43-78, 79; T.D.T.X. 340, p. 15, 26).

Because this unrefuted evidence established that there was no dangerous probability that the alleged predatory pricing scheme could succeed in the recoupment phase even if Petitioner went out of business, the Eleventh Circuit correctly entered judgment in favor of Rule on the attempted monopolization claim.

III. PETITIONER GIVES THE COURT NO REASON TO CONSIDER THE CONSPIRACY CLAIM.

A. Petitioner Failed To Argue At Trial Or In Its Appellate Brief That This Is A Price-Fixing Case Involving Per Se Rules Of Antitrust Law.

Petitioner suggests that the Court should grant review in this case "to correct the Eleventh Circuit's manifestly incorrect analysis on the conspiracy verdict, which threatens to undermine the Court's long established rule that price-fixing agreements, whether horizontal or vertical, are *per se* illegal." (Pet. 10). Petitioner's position with respect to the conspiracy verdict is fundamentally flawed, however, because this is not, and never has been, a price-fixing case. Petitioner did not argue at trial or in its appellate brief in the Eleventh Circuit that liability should be based on a price-fixing agreement or

that the *per se* rules of antitrust law should apply. Moreover, undisputed evidence in the record establishes that there is no factual basis for a *per se* price-fixing theory.

Petitioner's legal instructions to the jury conclusively establish that Petitioner chose to try its conspiracy claim under a rule of reason analysis, not under a *per se* price-fixing theory. In "Joint Request To Charge No. 4", Petitioner specified that its Section 1 claim was "for conspiracy to eliminate a competitor," not for conspiracy "to fix prices". (*Infra* at App. 1). Furthermore, in the last paragraph of this request, Petitioner asked the trial court to instruct the jury using the rule of reason standard, not a *per se* standard:

> Finally, you may also consider Defendants' purpose in imposing the restraint. A purpose or intent to harm competition, by itself, is not sufficient to establish an unreasonable restraint of trade. However, consideration of the purpose of the restraint may help you in determining if it would likely have a harmful effect on competition. You may consider, for example, whether Defendants imposed the restraint to achieve a legitimate business purpose and, if so, whether the restraint was tailored to achieve that legitimate business purpose, or, rather, was broader than necessary.

(*Infra* at App. 3). This instruction, which Petitioner requested at trial, directly conflicts with Petitioner's new position that the Eleventh Circuit's "injection of intent" into the conspiracy claim constituted a "manifestly incorrect analysis."

The appellate brief filed by Petitioner in the Eleventh Circuit similarly restricted Petitioner's Section 1 claim to an alleged "conspiracy to eliminate a competitor" which is subject to a rule of reason analysis. Petitioner's appellate brief described the only issue relating to the federal conspiracy claim as follows:

> "Whether the evidence that Rule sold its anchors at prices below its costs, together with direct evidence of Tie Down's initiation of and participation in the Rule/Tie Down plan to put U.S. Anchor out of business within a year, was sufficient (a) to show Defendants' predatory intent; (b) to exclude the possibility that Rule/Tie Down conduct was as consistent with permissible competition as with illegal conduct; and (c) to exclude the possibility that Rule and Tie Down acted independently of one another."

(Brief of Appellee/Cross-Appellant U.S. Anchor Mfg. Inc., p. 1). Notably, Petitioner made absolutely no mention of any "*per se* illegal price-fixing agreement" in the statement of the issues or anywhere else in its appellate brief.

Petitioner's pretrial order submission (R8-273, Attachment C), closing argument (R53-111-112) and response to Respondents' motions for judgment notwithstanding the verdict (R12-355-45,49), as well as the special verdict form (R10-321), also confirm that Petitioner did not try this case on a *per se* illegal price-fixing theory and that Petitioner did not advance this theory on appeal until *after* the Eleventh Circuit rendered opinion. In fact, these portions of the record show that the position taken by Petitioner at trial and in the Eleventh Circuit brief

squarely conflicts with the position now argued in this Court.

This Court often has recognized that arguments which were not timely advanced in the lower courts cannot support a writ for certiorari. *Posters 'n' Things, Ltd. v. United States*, No. 92-903 (U.S. May 23, 1994), Slip Op. 15; *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton*, 428 U.S. at 120. Accordingly, because Petitioner failed to argue at trial or in its appellate brief that this is a price-fixing case involving *per se* rules of antitrust law, Petitioner failed to preserve the conspiracy question for review by this Court.

B. The Eleventh Circuit's Decision On The Conspiracy Claim Is Consistent With Governing Authority.

The Eleventh Circuit's decision on the conspiracy verdict is wholly consistent Supreme Court authority. In discussing the conspiracy claim, the Eleventh Circuit summarized the elements of a conspiracy to restrain trade as "(1) an agreement to enter into a conspiracy (2) designed to achieve an unlawful objective." (Pet. App. 35a). The court also noted that "[f]ederal antitrust law requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately." (Pet. App. 36a). The court then concluded that Petitioner failed to prove its conspiracy claim because there was no evidence that Tie Down knowingly participated in unlawful activity and because

Tie Down's conduct was consistent with legitimate business practices. (Pet. App. 37a-38a).

The Eleventh Circuit's summary of the burden of proving an antitrust conspiracy follows the rulings of this Court in *Matsushita, supra,* and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). In *Monsanto* the Court held that "something more" than price discussions between a manufacturer and distributor must be shown to prove antitrust conspiracy:

> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

465 U.S. at 764. Similarly, in *Matsushita,* the Court instructed:

> In *Monsanto,* we emphasized that courts should not permit fact finders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.
>
> * * *
>
> . . . The evidence must "tend to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy.

475 U.S. at 593, 597-98.

Contrary to Petitioner's assertion, moreover, the Eleventh Circuit's decision does not depart from existing law regarding the *per se* illegality of vertical price-fixing agreements. Although the Eleventh Circuit did not expressly consider *per se* liability because Petitioner failed to make this argument before the court rendered its opinion, the Eleventh Circuit's application of the standard quoted above was proper under the facts of this case. Numerous authorities from this Court and the lower courts have held that the mere fact that a manufacturer suggests resale prices which are then implemented by the distributor does not invoke *per se* liability. *Monsanto, supra,* 465 U.S. at 764 n. 9; *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Lewis Service Center Inc. v. Mack Trucks Inc.*, 714 F.2d 842, 846 (8th Cir. 1983); *Carlson Mach. Tools, Inc. v. American Tool Inc.*, 678 F2d 1253, 1261 (5th Cir. 1982); *Chisholm Bros. Farm Equip. Co. v. International Harv. Co.*, 498 F.2d 1137, 1142 (9th Cir. 1974).

As this Court explained in *Monsanto*:

> Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.
>
> * * *
>
> . . . [T]he fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to

> exchange information about the prices and the reception of their products in the market.

Monsanto, 465 U.S. at 761-762. *Per se* liability for vertical price fixing does not arise absent evidence that the manufacturer somehow forced compliance with its suggested resale prices.

> Resale price maintenance of maximum or minimum price is a per se violation of the antitrust laws. [cit.] The mere suggestion of list prices by a manufacturer, however, is not enough to establish the existence of resale price maintenance. [cit.] . . . [R]esale price maintenance must involve making a meaningful event depend on compliance or non-compliance with the "suggested" or "stated price." [cit.] Evidence of exposition, persuasion, argument or pressure on the part of the manufacturer is insufficient without more, to establish coercion required for resale price maintenance.

Carlson Mach. Tools, 678 F.2d at 1261; *see also The Jeanery Inc. v. James Jeans Inc.*, 849 F.2d 1148, 1154 (9th Cir. 1988) ("proof of an agreement must 'include more than a showing that the distributor conformed to the suggested price.' ").

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990), cited by Petitioner, does not state a different rule. Rather, *Atlantic Richfield* addressed a traditional *per se* illegal vertical price-fixing scheme where "resale price maintenance" allegedly resulted from "threats, intimidation and coercion" used by the manufacturer "to secure compliance with its terms." 495 U.S. at 332. *Atlantic Richfield*, therefore, has no application to this case because

there was never an allegation of forced compliance with suggested resale prices.

In this case, the Eleventh Circuit observed that U.S. Anchor failed to adduce any evidence that Tie Down "had any control over Rule's prices." (Pet. App. 13a). In its appellate brief, Tie Down had directed the Eleventh Circuit to undisputed evidence that Rule always exercised independence in setting its resale prices. (R33-187; R34-100; R46-33; R34-35). U.S. Anchor did not challenge this evidence on appeal but rather rested its case on evidence that Tie Down "recommended" that Rule lower its market prices and offered to give Rule discounts in order to allow Rule to compete. (Pet. App. 37a). U.S. Anchor even conceded that Rule charged only three of its customers the low prices described in the "MacKarvich memo." (R34-24; R40-141). Thus, the Eleventh Circuit properly analyzed the conspiracy claim under the rule of reason standard rather than the *per se* standard because of the undisputed evidence that Rule always retained complete independent control over its ultimate resale prices.

C. The Eleventh Circuit Correctly Held That The Particular Evidence In This Case Is Insufficient To Support The Conspiracy Claim.

Petitioner's own expert conceded at trial that Tie Down did not engage in predatory pricing. (R39-153-158). It is undisputed that Tie Down made a profit above its total costs on its anchor sales to Rule during the entire period in question. *Id.*

In an effort to subject Tie Down to liability under a conspiracy theory, Petitioner has mischaracterized the

"MacKarvich memorandum" as a "plan" proposing that Rule set prices at predatory levels in an effort to "force U.S. Anchor to incur losses." (Pet. 5, 9, 13, 18, 20-21). Petitioner also incorrectly asserts that Tie Down and Rule "agreed" to fix Rule's prices at the levels described in the memorandum. *Id.* The Eleventh Circuit reviewed this document in the context of all the evidence and reached a different conclusion. (Pet. 36a-37a).

Petitioner's description of this document ignores the unrefuted testimony that the memorandum was nothing more than a *pro forma* analysis to try to determine whether Petitioner could continue indefinitely to significantly undercut Rule's prices. (R34-15; *see* Pet App. 7a, 14a). The second page of the document demonstrates that it was created only after Rule had lost most of its market share to Petitioner and was based on the assumption that Rule would retain "only 25%" of prior sales. (Pet. App. 104a; *see also* Pet. App. 7a). Moreover, there is absolutely no evidence that Tie Down and Rule "agreed" to fix prices at any level shown in the document. To the contrary, as conceded by Petitioner's appellate brief, Rule made sales to only three of its customers at prices reflected in the memorandum. According to Petitioner, only "40% of Rule's sales were at the lowest level prices proposed by MacKarvich." (Brief of Appellee/Cross-Appellant U.S. Anchor Mfg., Inc., 8). While the underlying data evidenced that actually only 17% of Rule's sales were at these prices, (R34-24, 25, 41-53), even under Petitioner's version of the facts, most of the sales made by Rule were *not* at prices mentioned in the MacKarvich memorandum. As shown above, it is undisputed that

Rule always exercised independence with respect to its ultimate resale prices.

The Eleventh Circuit noted that the MacKarvich memorandum "does not show that Tie Down desired to employ predatory means to drive U.S. Anchor from the market." (Pet. App. 37a). "It says nothing about Rule's costs, and U.S. Anchor does not dispute that Tie Down had no knowledge of Rule's costs other than the price paid for anchors." *Id.* While Petitioner argues that "handling charges" and "label costs" should be added to the alternative prices shown in the MacKarvich memorandum to impute predatory intent to Tie Down, there is no evidence that Mr. MacKarvich ever considered such additional costs when the memorandum was written. The chart found at page 107a of the petition, which adds handling charges and label costs to the anchor prices, was not a trial exhibit but was constructed by counsel in connection with the petition for rehearing in the Eleventh Circuit. More importantly, Petitioner's actual trial exhibits, which were in fact admitted into evidence, show that even after adding handling charges and label costs to the anchor prices actually charged, Rule's revenues always exceeded the total amount paid by Rule to Tie Down. (Compare U.S.T.X. 517, U.S.T.X. 405 and U.S.T.X. 395, *infra* App. 6-App. 9). Thus, Petitioner's own evidence demonstrates that the Eleventh Circuit correctly held that Respondents are entitled to judgment as a matter of law on the conspiracy claim because Tie Down did not knowingly participate in any below-cost pricing scheme.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied in this case.

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May 27, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

U.S. ANCHOR MFG., INC., Plaintiff, v. RULE INDUSTRIES, INC. and TIE DOWN, INC. a/k/a TIE DOWN ENGINEERING, INC., Defendants, v. WILLIAM CHAPMAN and U.S. ANCHOR MFG., INC., Defendants-in-Counterclaim.	)	CIVIL ACTION FILE NO. 1:86-CV-2447-JTC

JOINT REQUEST TO CHARGE NO. 4

Plaintiff's second antitrust claim is for conspiracy to eliminate a competitor under Section 1 of the Sherman Act. In order to establish such a claim, the Plaintiff must prove:

First, that there was a conspiracy;

Second, that the purpose of the conspiracy was to engage in a common course of anticompetitive conduct;

Third, that the conspiracy produced an adverse impact on the relevant market as an unreasonable restraint of trade; and

Fourth, that the Plaintiff suffered injury as a proximate result of the Defendants' wrongful acts.

I will now explain what I mean by the term "unreasonable restraint of trade." An unreasonable restraint of trade is one which substantially harms competition in the relevant market.

In determining whether defendants' restraint had a substantially harmful effect on competition in the relevant market, you should consider the nature of the restraint, the history of the restraint, the structure of the market, and defendants' position in the market. You should look at such factors as the number of companies or firms in the market, the reasons and the way in which the restraint was imposed, and the nature of the market before and after the restraint was imposed.

You must also consider the extent to which competition was harmed. A restraint that has only a slight or insubstantial impact on competition is not unreasonable or unlawful.

Evidence that defendants' restraint has harmed plaintiff's business is not enough by itself, although that is one relevant factor. Plaintiff must show that the restraint harmed competition in the relevant market, not just that it harmed plaintiff's business.

You should consider defendants' market power and how much of the market was affected by defendants' restraint. If defendants had little market power or defendants' restraint affected only a small part of the market, then it is less likely that defendants' restraint had a substantial effect on the competition in the market. In considering defendants' market power, you may consider defendants' market share, but market share may not always, by itself, show defendants' market power.

You should also consider whether the restraint influenced or affected the price, output, or product quality in the relevant market. Where a restraint does not affect price, output, or product quality, it is not as likely to substantially harm competition as a restraint that does.

In determining whether the restraint was unreasonable, you must also weigh any effects of the restraint which are helpful to competition against any harmful effects. For instance, you should consider whether consumers have benefited from the restraint, whether the restraint has helped the defendants in competing with other products, whether the restraint has helped to avoid unreasonable profiteering by others in the market, etc. All of these may be aspects of the restraint which benefit competition. If the beneficial effects outweigh the harmful effects, or if the net effect on competition is harmful but insubstantial, the restraint is not unreasonable or unlawful.

Finally, you may also consider defendants' purpose in imposing the restraint. A purpose or intent to harm competition, by itself, is not sufficient to establish an unreasonable restraint of trade. However, consideration of the purpose of the restraint may help you in determining if it would likely have a harmful effect on competition. You may consider, for example, whether defendants imposed the restraint to achieve a legitimate business purpose and, if so, whether the restraint was tailored to achieve that legitimate business purpose, or, rather, was broader than necessary.

[*See* Attachment A].

Respectfully submitted,

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ATTACHMENT A TO JOINT
REQUEST TO CHARGE NO. 4

Plaintiff proposes to add the following paragraph to Joint Request to Charge No. 4, at the beginning of page 2:

"To prove that a conspiracy created an unreasonable restraint of trade, it is not necessary to show that the Defendants obtained a monopoly, or that there was a dangerous probability that monopolization would occur."

Defendants object to the inclusion of this paragraph.

PLAINTIFF'S EXHIBIT 395

RULE-SC-86

RULE-SC-86 RULE STANDARD COST 1986

Anchor Model	ANCHOR COST* TDE TO RULE	HANDLING CHARGE CALCULATION	HANDLING CHARGES* TDE TO RULE	LABEL COST* TDE TO RULE	*TOTAL (COLS. B+D+E)*
E-80 (5E)	$2.584	4.46# * 1.15 = 5.13# * $.055 =	$0.282	$0.11	*$2.98*
E-100 (7E)	$3.575	5.43# * 1.15 = 6.24 * $.055 =	$0.343	$0.11	*$4.03*
E-110 (10E)	$4.842	6.09# * 1.15 = 7.00# * $.055 =	$0.385	$0.11	*$5.34*
E-120 (13E)	$6.559	7.75# * 1.15 = 8.91# * $.055 =	$0.490	$0.11	*$7.16*
E-130 (15E)	$7.369	9.09# * 1.15 = 10.45# * $.055 =	$0.575	$0.11	*$8.05*
M-130 (#2.5)	$2.495	3.18# * 1.15 = 3.66# * $.055 =	$0.201	$0.11	*$2.81*
M-240 (#4)	$3.828	4.11# * 1.15 = 4.73# * $.055 =	$0.260	$0.11	*$4.20*
M-480 (#8)	$5.827	8.28# * 1.15 = 9.52# * $.055 =	$0.524	$0.11	*$6.46*
M-740 (#13)	$9.665	13.0# * 1.15 = 14.95# * $.055 =	$0.822	$0.11	*$10.60*
M-1050 (#18)	$12.049	17.40# * 1.15 =20.01# * $.055 =	$1.101	$0.11	*$13.26*
M-1300 (#22)	$16.130	25.75# * 1.15 = 29.61# * $.055 =	$1.629	$0.11	*$17.87*
M-1600 (#40)	$27.056	45.0# * 1.15 = 51.75# * $.055 =	$2.846	$0.11	*$30.01*
M-2400 (#65)	$53.802	72.0# * 1.15 = 82.8# * $.055 =	$4.554	$0.11	*$58.57*
M-2800 (#85)	$82.604	91.0# * 1.15 = 104.7# * $.055 =	$5.756	$0.11	*$88.47*

ANCHOR COST – FINN DOCUMENT (ANCHOR 75)
HANDLING CHARGES – ADDINGTON DOCUMENT (HDLG 6,7)
LABEL COST – ADDINGTON DOCUMENT (WP#CS) AND GREENING EX. #3,#4

P

TIE DOWN ENGINEERING –

RULE INDUST

RULE MODEL NOS: (USA MODEL NOS:)		1985 - 1986 SEASON AVERAGE REVENUE FROM RULE (RULE SC86)	QUANTITY SOLD (ADDING-TON)	TOTAL REVENUE FROM RULE	1986 - 1987 AVERAGE REVENUE FROM RULE (RULE SC87)	QUA SC (ADI TC
E-80	(5E)	$ 2.98	6,448	$ 19,215	$ 2.53	6
E-100	(7E)	4.03	12,039	48,517	3.49	12
E-110	(10E)	5.34	14,939	79,774	4.56	17
E-120	(13E)	7.16	5,328	38,148	6.28	7
E-130	(15E)	8.05	3,097	24,931	7.05	5
M-130	(#21)	2.81	1,670	4,693	2.79	2
M-240	(#4)	4.20	4,941	20,752	4.19	6
M-480	(#8)	6.46	14,000	90,440	6.41	18
M-740	(#13)	10.60	6,529	69,207	10.50	8
M-1050	(#18)	13.26	1,917	25,419	13.07	1
M-1300	(#22)	17.87	1,808	32,309	17.61	1
M-1600	(#40)	30.01	349	10,473	30.11	
M-2400	(#65)	58.57	97	5,681	58.63	
M-2800	(#85)	88.47	44	3,893	84.81	
TOTALS				473,452		

AINTIFF'S EXHIBIT 405

REVENUE ANALYSIS (HOOKER FLUKE ANCHORS)

RIES – STANDARD COST SUMMARY

	SEASON		1987 - 1988 SEASON			1988 - 1989 SEASON	
TITY LD ING- N)	TOTAL REVENUE FROM RULE	AVERAGE REVENUE FROM RULE (RULE SC88)	QUANTITY SOLD (ADDING-TON)	TOTAL REVENUE FROM RULE	AVERAGE REVENUE FROM RULE (RULE SC89)	QUANTITY SOLD (ADDING-TON)	TOTAL REVENUE FROM RULE
15	$ 17,495	$ 2.81	6,631	$ 18,633	$ 3.10	5,554	$ 17,217
31	42,337	3.96	10,902	43,172	4.06	9,357	37,989
05	78,455	5.19	14,880	77,227	5.32	13,680	72,778
32	47,301	6.90	8,639	59,609	7.05	6,985	49,244
79	38,627	7.77	5,382	41,818	7.93	5,529	43,845
09	5,605	3.21	2,493	8,003	3.24	2,272	7,361
05	27,675	4.66	6,934	32,312	4.79	5,929	28,400
97	121,130	5.72	22,943	131,234	5.86	23,343	136,790
17	93,629	9.98	10,078	100,578	10.21	9,745	99,496
56	25,565	11.95	2,718	32,480	12.20	2,918	35,600
57	32,702	15.58	1,888	29,415	16.26	2,011	32,699
28	15,898	37.75	377	14,232	38.71	673	26,052
01	11,785	78.07	106	8,275	71.72	132	9,467
45	12,297	95.08	51	4,849	95.08	12	1,141
	570,501			601,837			598,079

DEPOSITION EXHIBIT

Andrews 53
11/27/90 Rc

RULE INDUSTRIES

(AVERAGE REVENUE/AVERAGE VARIABLE COST/ AVERAGE TOTAL COST)

(HOOKER FLUKE ANCHORS)

1986	Average Revenue Totals (Rule RA)	$ 541,883
1986	Average Variable Cost Totals (Rule AVC 86)	620,532
1986	Average Total Cost Totals (Rule ATC 86)	757,677
1987	Average Revenue Totals (Rule RA)	612,971
1987	Average Variable Cost Totals (Rule AVC 87)	738,264
1987	Average Total Cost Totals (Rule ATC 87)	876,435
1988	Average Revenue Totals (Rule RA)	631,695
1988	Average Variable Cost Totals (Rule AVC 88)	762,290
1988	Average Total Cost Totals (Rule ATC 88)	901,809
1989	Average Revenue Totals (Rule RA)	624,471

1989	Average Variable Cost Totals (Rule AVC 89)	744,058
1989	Average Total Cost Totals (Rule ATC 89)	887,494